No. 88-192

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

MCKESSON CORPORATION,
Petitioner,
v.
DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO,
DEPARTMENT OF BUSINESS REGULATION, and
OFFICE OF THE COMPTROLLER, STATE OF FLORIDA,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

REPLY BRIEF FOR THE PETITIONER ON REARGUMENT

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INTRODUCTION

McKesson respectfully submits this Brief in response to the State's Brief on Reargument.[1]

[1]McKesson's updated Rule 28.1 list is attached to this Brief as Appendix A.

The State in its Brief on Reargument has refashioned the arguments that McKesson has made to this Court. The State's Brief suggests that McKesson has argued that every state in every case involving a constitutional challenge to a tax statute must provide retroactive relief. *See* State's Brief on Reargument at 2, 6, 12 n.7, and 13. McKesson, in fact, has asked the Court to adopt a far more narrow rule that responds to the facts of this case.

Florida imposed the discriminatory tax scheme to protect Florida commerce at the expense of interstate commerce. Florida enacted the challenged tax statutes in violation of clearly established federal constitutional law. Further, Florida has tenaciously resisted equal taxation, and has never sought retroactively to equalize the tax burden. Therefore, Florida, which has waived sovereign immunity to allow suits for tax refunds, must provide an appropriate tax refund to McKesson to remedy its unconstitutional discrimination.

McKesson has not argued that a state whose tax statutes violate the Commerce Clause must provide retroactive relief in every case. This Court does not have to find that all states in all cases challenging tax statutes under the Commerce Clause must provide retroactive relief from unconstitutional discrimination in order to find that Florida must provide such relief in this case. McKesson, as well as 20 states in their amici curiae brief,[2] submit that a state that enacts a tax in violation of clearly established Commerce Clause law differs from a state that imposes a tax that does not violate clearly established law. As the 20 states note –

> if the tax violates clearly established law and if the taxpayer pays under protest, the state could be considered to have been put on notice that its revenues may not be secure from claims for refunds under the questioned statute.
>
> ....
>
> In contrast, a state is justified in relying on a tax that taxpayers have paid voluntarily without protest and that does not violate clearly established law.

Amici Curiae Brief of 20 States at 5.

A state whose tax statutes have not violated clearly established federal constitutional law may invoke equitable considerations to avoid retroactive liability for unlawful taxation. However, under *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), a state whose tax statutes violate clearly established law may not avoid such relief. Further, under *Welch v. Henry*, 305 U.S. 134, 146-151 (1938), and other cases, a state that cannot remedy its discriminatory taxation by retroactive taxation may have to remedy its discrimination through an appropriate tax refund. Florida, in this case, is such a state.

I. UNDER THE CIRCUMSTANCES OF THIS CASE, FLORIDA MUST PROVIDE AN APPROPRIATE TAX REFUND

This Court's decisions direct states to provide retroactive relief from state taxation that violates federal law. *See, e.g., Maryland v. Louisiana*, 452 U.S. 456, 457 (1981); *Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239, 247 (1931); *Montana Nat'l Bank v. Yellowstone County*, 276 U.S. 499, 504-05 (1928).

McKesson has acknowledged that this Court's prospectivity doctrine in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), may allow exceptions in certain cases. The Court's prospectivity doctrine permits a court to announce a new principle of law but avoid injustice to a party that had correctly relied to its detriment on the preceding principle of law. Under *Chevron*, when a court in deciding a case has established a new principle of law, the court may weigh certain factors

[2]Brief of Georgia, Louisiana, Maryland, Michigan, Mississippi, Nebraska, Nevada, New Hampshire, New Jersey, North Carolina, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virgin Islands, Virginia, Wisconsin, and Wyoming as Amici Curiae in Support of Respondents ("Amici Curiae Brief of 20 States").

to determine whether the new principle of law shall operate retroactively or only prospectively. 404 U.S. at 106. Thus, where a state has collected taxes pursuant to a statute that, under a new Commerce Clause principle, is held unconstitutional, a court may properly apply *Chevron* to determine how the new principle should operate.

For example, in the action consolidated with this case, *American Trucking Ass'ns v. Smith*, No. 88-325, Arkansas has argued that this Court's decision in *American Trucking Ass'ns v. Scheiner*, 483 U.S. 266 (1987), established a new principle of law. Therefore, if Arkansas is correct, the Arkansas Supreme Court in the *Smith* case may have correctly concluded, under the *Chevron* standard, that Arkansas had justifiably relied on former law and that retroactive relief should not be available in that case.

In this case, however, the Florida Supreme Court's opinion acknowledges that the court simply applied settled Commerce Clause principles to hold that Florida's discriminatory tax scheme violated the Constitution. "[W]hen a decision of this Court merely has applied settled precedents to new and different factual situations, no real question has arisen as to whether the later decision should apply retrospectively." *United States v. Johnson*, 457 U.S. 537, 549 (1982). Under *Chevron* and the usual rule that judicial decisions operate retroactively, *see St. Francis College v. Al-Khazraji*, 481 U.S. 604, 608-09 (1987), McKesson is entitled to retroactive relief from Florida's violation of clearly established law.[3]

[3]The states of California, Idaho, Montana, North Dakota, Texas, Utah, Arizona, Hawaii, Minnesota and the District of Columbia, which filed an amici curiae brief on reargument in support of the State in this case, agree with McKesson that *Chevron* should apply to any consideration of prospectivity in this case. *See* Amici Curiae Brief on Reargument of California, *et al.* at 3.

Further, McKesson has acknowledged that the Court in this case does not have to address whether a state that has not waived its sovereign immunity must provide retroactive relief from taxation that violates federal law. The Florida Supreme Court's opinion does not raise sovereign immunity as an issue in this case. Nonetheless, both the State and certain amici curiae argue that sovereign immunity would bar McKesson from maintaining an action for damages for Florida's violation of the Commerce Clause. Their argument, of course, is beside the point. McKesson has not sued Florida for damages but rather has sought an appropriate tax refund. (J.A. 1-10) The State has conceded that Florida has waived sovereign immunity for tax refunds. State's Brief on Reargument at 17.[4]

Indeed, Florida law has long permitted a taxpayer to challenge the validity of a tax and to seek a refund of invalid taxes. "There have been many suits in Florida to determine the validity of a tax and to direct the making of a refund by the Comptroller under F.S. Section 215.26, F.S.A." *State ex rel. Victor Chem. Works v. Gay*, 74 So.2d

[4]The remedy that McKesson has sought is, in fact, the least intrusive remedy available. McKesson first put the State on notice that it would challenge Florida's tax scheme. McKesson continued to pay all taxes due under the challenged statutes while it pursued this litigation. McKesson did not seek federal court jurisdiction to secure an injunction against Florida's discrimination, but rather filed its action in state court. Arguably, if Florida forecloses tax refunds in Commerce Clause cases, and therefore does not provide a sufficient remedy for its unlawful taxation, the Tax Injunction Act, 28 U.S.C. § 1341, would not bar taxpayers from seeking federal injunctive relief in future cases. *See Hillsborough v. Cromwell*, 326 U.S. 620, 625-26 (1946) (allowing federal jurisdiction because state remedy did not clearly afford full protection of federal rights). *Cf. American Trucking Ass'n v. Gray*, 483 U.S. 1306 (Blackmun, Circuit Justice 1987) (granting application for injunction; stating that Arkansas' denial of recovery of unconstitutional taxes would constitute irreparable injury); Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 Cornell L. Q. 499, 518 (1928) (reasoning that "states could readily prevent interference with their tax collection through suits in the federal courts, by removing the possibility of the claim that there is no adequate remedy at law in the state courts, if the tax is paid").

560, 564 (Fla. 1954). Florida law historically has favored taxpayers' expeditious recovery of improper taxes. *See, e.g., Colding v. Herzog*, 467 So.2d 980, 983 (Fla. 1985); *City of Tampa v. Thatcher Glass Corp.*, 445 So.2d 578, 580 (Fla. 1984); *Osterndorf v. Turner*, 426 So.2d 539, 545-46 (Fla. 1982); *State ex rel. Palmer-Florida Corp. v. Green*, 88 So.2d 493, 495 (Fla. 1956). In *Green*, for example, the Florida Supreme Court, ordering a tax refund, stated that "[i]n this country where the citizen has paid good money illegally and has an election of remedies for recovery, he should be permitted to employ the most complete and expeditious remedy possible to recover" the taxes. 88 So.2d at 495.[5]

Finally, McKesson has acknowledged that a state may sometimes avoid any refund liability for unconstitutional taxation by promptly ending the discrimination and then retroactively equalizing the tax burden. The State apparently does not contest McKesson's argument that, in some cases, a state might remedy discriminatory taxation by retroactively taxing the favored firms, so long as the tax retroactively covers only a brief period. The State also agrees with McKesson that retroactive taxation would not, however, be an appropriate remedy in this case. *See* State's Brief on Reargument at 24-26.

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[5]Florida, like other states with tax refund statutes, may of course impose certain procedural requirements for a tax refund action, such as a statute of limitations period. The State has never claimed that McKesson did not comply with all such requirements. However, the State has not, to McKesson's knowledge, conceded that other parties that may have filed claims have complied with Florida's procedural requirements. Since McKesson has not sought a refund of hundreds of millions of dollars, McKesson does not know the source for the State's references in its Brief to "hundreds of millions of dollars" in exposure. No Florida court has ever received or considered such figures.

II. THE COMMERCE CLAUSE'S PROTECTION OF THE NATIONAL COMMON MARKET WARRANTS AN EFFECTIVE REMEDY FOR STATES' PROTECTIONIST DISCRIMINATION

This Court consistently has affirmed the Commerce Clause's critical role in protecting "the common market created by the Framers of the Constitution." *Great Atl. & Pac. Tea Co. v. Cottrell, Inc.*, 424 U.S. 366, 380 (1976). The Commerce Clause "furthers strong federal interests in preventing economic Balkanization." *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276 (1984). The Court has regularly and rigorously scrutinized state efforts to effect economic protectionism. *See, e.g., Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986); *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977). Nonetheless, the State contends that states do not have to provide retroactive relief to remedy violations of the Commerce Clause.

First, the State argues that retroactive relief is inappropriate because the Commerce Clause primarily allocates power to the federal government, rather than protects individuals from states' actions. The State's argument ignores this Court's firmly established doctrine that "the Commerce Clause not only grants Congress the authority to regulate commerce among the States, but also directly limits the power of the States to discriminate against interstate commerce." *New Energy Co. v. Limbach*, ___ U.S. ___, 108 S.Ct. 1803, 1807 (1988). "The freedom of commerce which allows the merchants of each state a regional or national market for their goods is not to be fettered by legislation, the actual effect of which is to discriminate in favor of intrastate businesses." *Best & Co. v. Maxwell*, 311 U.S. 454, 457 (1940). The legion of Commerce Clause cases in this Court is ample evidence that injured parties may invoke the Commerce Clause to seek effective relief from states' discrimination against interstate commerce.

The Court in *Davis v. Michigan Dep't of Treasury*, ___ U.S. ___, 109 S.Ct. 1500 (1989), rejected an argument that was similar to the argument that the State makes here. In *Davis*, an injured taxpayer claimed that a Michigan tax violated the doctrine of intergovernmental tax immunity by favoring retired state and local government employees over retired federal employees. The state argued that the taxpayer could not seek relief from the state's discriminatory taxation. The state contended "that the purpose of the immunity doctrine is to protect governments and not private entities or individuals," and therefore the taxpayer was not entitled to invoke the doctrine for protection. *Id.* at 1507. The Court rejected the state's contention.

> It is true that intergovernmental tax immunity is based on the need to protect each sovereign's governmental operations from undue interference by the other. [Citations omitted] But it does not follow that private entities or individuals who are subjected to discriminatory taxation on account of their dealings with a sovereign cannot themselves receive the protection of the constitutional doctrine.

Id. Likewise, McKesson, which was subjected to Florida's discriminatory taxation, may invoke the Commerce Clause for protection.

Second, the State argues that this Court's enforcement of the Commerce Clause, unlike the Court's enforcement of other constitutional provisions, does not warrant an effective remedy. The State's assertion ignores this Court's Commerce Clause doctrine. The Court's solicitude for the Commerce Clause has led the Court, for example, to look beyond a challenged statute's ostensible purpose and examine its practical effect. In each case, the Court determines "whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce." *Best & Co. v. Maxwell*, 311 U.S. 454, 455-56 (1940). Both the Court and commentators have acknowledged that "when the centrifugal, isolating or hostile forces of localism are manifested in

state legislation, the interests of the union" require judicial intervention. Brown, *The Open Economy: Justice Frankfurter and the Position of the Judiciary*, 67 Yale L. J. 219, 220 (1957).

The State's assertion also ignores the facts of this case. Florida has not allowed the Commerce Clause to deter the State from discriminatory taxation in favor of local commerce. Within this decade, Florida has imposed three successive alcoholic beverage tax schemes that discriminated against interstate commerce. After this Court's decision in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), the Florida legislature, unconcerned about liability for discrimination, revised Florida's discriminatory alcoholic beverage tax scheme but preserved the discrimination. A legislative sponsor of the revised tax scheme explained: "my entire purpose and intent is simply to retain what we have done for the last twenty years." (J.A. 84) During a later legislative debate, the sponsor reiterated the revised law's purpose. Noting that Florida had "granted a benefit to the distillers in Florida using Florida products for many years," the sponsor explained: "[w]e're simply trying to protect what was in place prior to this Supreme Court [*Bacchus*] decision." (J.A. 141-42)

After the Florida Supreme Court struck down the revised law in this case, the Florida legislature, again unconcerned about liability for discrimination, again revised the tax scheme but preserved the discrimination. The same legislative sponsor, who also sponsored the new revised law, again explained that "[o]ur whole-hearted effort here is to protect something that's been in Florida for some 27 years." (M.A. 46a) Another legislative sponsor of the new revised law stated that even if a court held that the new tax scheme violated the Commerce Clause, Florida could still retain the taxes collected under the statutes. "[T]here will not be a loss of even dollar one to the State of Florida." (M.A. 61a-62a)

The same Florida court that initially held that Florida's first revised scheme was unconstitutionally discriminatory found that the revised, revised scheme was "but a warmed-over version, dressed up

in different clothing" of the earlier scheme. *Ivey v. Bacardi Imports, Co., Inc.*, 541 So.2d 1129, 1134 (Fla. 1989). The Florida Supreme Court, affirming that court's judgment, also found the revised, revised scheme "clearly discriminatory." *Id.* at 1140.

The Florida legislature acted to preserve Florida's protectionism despite this Court's holding that state legislation that effects economic protectionism is virtually *per se* invalid under the Commerce Clause. *See Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). The Florida legislature ignored this Court's doctrine that a state may not "build up its domestic commerce by means of unequal and oppressive burdens upon the industry and business of other States." *Guy v. Baltimore*, 100 U.S. 434, 443 (1880). *See also Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 44 (1980). A state may not "'legislate according to its estimate of its own interests [and] the importance of its own products.'" *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 533 (1949) (quoting Story, The Constitution, §§ 259, 260).

Lawmakers in every state must confront the same parochial pressures to which the Florida legislature responded in effecting its protectionism. *See* Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091, 1114-15 (1986); L. Tribe, American Constitutional Law § 6-5 at 409 and § 6-1 (2d ed. 1988). "Each state has an economic incentive to impose taxes whose burden will fall, so far as possible, on residents of other states," and states "may also use taxation not to raise revenue but to protect the state's producers or other sellers from the competition of nonresidents." R. Posner, Economic Analysis of Law § 26.3 at 602 (3d ed. 1986). Nonetheless, the State in this case invites this Court to hold that even when a state persistently imposes taxes in violation of clearly established law under the Commerce Clause, the state does not have to provide any retroactive relief.

The Florida Supreme Court's decision, denying any retroactive relief from Florida's discrimination in violation of clearly established

law, emboldened Florida to enact yet another discriminatory tax scheme. Numerous other states, as the numerous amici curiae briefs attest, consider this Court's resolution of the Florida case to be significant. This Court's affirming the Florida court's denial of relief would embolden not only Florida but all states to enact protectionist legislation that threatens our national common market. This Court's affirming its decisions directing states to provide retroactive relief from discriminatory taxation would ensure that states "in framing their taxing measures to reach interstate commerce shall be at pains to do so in a manner which avoids the evils forbidden by the commerce clause." *Nippert v. Richmond*, 327 U.S. 416, 434 (1946).[6]

III. THE STATE'S "EQUITABLE" ARGUMENTS FOR AVOIDING ANY EFFECTIVE RELIEF IN THIS CASE ARE BOTH IRRELEVANT AND UNFOUNDED

The State in its Brief argues that the Florida Supreme Court's decision to apply its own prospectivity doctrine to limit its federal constitutional holding is not the issue in this case. Rather, the State argues, this Court only must consider the State's "equitable" arguments to find that the Florida court properly denied a tax refund "in any event."

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[6]The State's references to cases such as *Heckler v. Mathews*, 465 U.S. 728 (1984), *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142 (1980), and *Stanton v. Stanton*, 421 U.S. 7 (1975), are irrelevant. McKesson has never challenged the Florida Supreme Court's prerogative in choosing the form of prospective relief – whether to extend Florida's tax preferences to the excluded class or to withdraw the preferences from the favored class. However, the Florida court's choice of prospective relief did not obviate McKesson's claim for retroactive relief from Florida's unlawful taxation. This Court has not limited an injured taxpayers' relief to a prospective injunction. *See* McKesson's Brief on Reargument at 8-10. As the Court stated in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 267-68 n.7 (1984), merely severing the discriminatory exemptions "would not relieve the harm inflicted during the time the wholesalers' imported products were taxed but locally produced products were not."

The State's argument fails to acknowledge that the Florida Supreme Court decided that it could deny a tax refund in this case only by implicitly deciding that it did not have to apply this Court's remedial principles for federal constitutional cases. The reason that McKesson is in this Court is that the Florida Supreme Court was not correct. The Florida court could not apply this Court's constitutional doctrine to strike down Florida's discrimination but then ignore this Court's principles concerning the appropriate remedy. *See Allegheny Pittsburgh Coal Co. v. County Comm'n*, ___ U.S. ___, 109 S.Ct. 633, 637 (1989); *Chapman v. California*, 386 U.S. 18, 21 (1967). *See generally* Hill, *Constitutional Remedies*, 69 Colum. L. Rev. 1109 (1969). As the Court stated in *Bush v. Lucas*, 462 U.S. 367, 374 (1983), "[t]his Court has fashioned a wide variety of nonstatutory remedies for violations of the Constitution by federal and state officials." The 50 states may not apply their own 50 different remedial standards when enforcing the federal Constitution.

Certain amici curiae have argued that states should be free to apply their own remedial doctrine even in cases involving federal constitutional rights. *See* Amici Curiae Brief on Reargument of the National Conference of State Legislatures, *et al.* They argue, for example, that this Court has remanded cases challenging unconstitutional state taxation to the state courts because state law rather than federal law governs the availability of refunds. This Court, however, has remanded such cases to the state courts when the state courts had not already addressed the refund issues "in the first instance." *See, e.g., Tyler Pipe Indus., Inc. v. Washington State Dep't of Revenue*, 483 U.S. 232, 252-53 (1987); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 277 (1984). The Court did not remand the cases because federal law does not apply. Rather, the Court stated that "*the federal constitutional issues involved* may well be intertwined with, or their consideration obviated by, issues of state law." *Bacchus*, 468 U.S. at 277 (emphasis added). "It may be, for example, that given an unconstitutional discrimination, a full refund is mandated by state law." *Id.* at 277 n.14.

The amici curiae also cite *Owens v. Okure*, ___ U.S. ___, 109 S.Ct. 573 (1989), and *Wilson v. Garcia*, 471 U.S. 261 (1985), to support their argument. *See* Amici Curiae Brief on Reargument of the National Conference of State Legislatures, *et al.* at 21. In *Owens* and *Wilson*, however, this Court held only that courts adjudicating claims under 42 U.S.C. § 1983 should apply certain state statutes of limitations periods. As the Court noted in *Wilson*, federal statutes commonly fail to include specific statutes of limitations. 471 U.S. at 266. Neither *Owens* nor *Wilson* supports the amici curiae's claim that state courts may apply their own remedial doctrine to limit their federal constitutional holdings. Indeed, even these amici curiae acknowledge that "as a general matter, it ultimately is for this Court to determine whether particular forms of relief are necessary to remedy violations of the federal Constitution." Amici Curiae Brief on Reargument of the National Conference of State Legislatures, *et al.* at 19.

Under *Great N. Ry. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358 (1932), state courts may apply their own prospectivity doctrine in cases challenging state statutes under *state* law. *See Mackey v. United States*, 401 U.S. 667, 698 (1971) (Harlan, J., concurring in part and dissenting in part). "*Sunburst* does not, of course, suggest that [a court] may ignore constitutional interests in deciding whether to attach retrospective effect to a constitutional decision of this Court." *Lemon v. Kurtzman*, 411 U.S. 192, 200 n.2 (1973).

The *Chevron* doctrine, rather than the Florida court's own prospectivity doctrine, should have guided the Florida court's consideration of prospectivity in this case. Under the *Chevron* doctrine, a court weighs the respective advantages and disadvantages of prospectivity and retroactivity only when its decision has established a new principle of law. *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106 (1971). *See also St. Francis College v. Al-Khazraji*, 481 U.S. 604, 608-609 (1987); *United States v. Johnson*, 457 U.S. 537, 550 n.12 (1982); *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 496-99 (1968). Otherwise, *Chevron's* exception to the usual rule of retroactivity would become a license for

courts, in every case, to adopt the processes of a legislature and decide how to regulate the effects of their decisions. *See Mackey v. United States*, 401 U.S. 667, 677-81 (1971) (Harlan, J., concurring in part and dissenting in part); *James v. United States*, 366 U.S. 213, 225 (1961) (Black, J., concurring in part and dissenting in part); Mishkin, *The Supreme Court 1964 Term - Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 Harv. L. Rev. 56, 59-60, 65-66 (1965).

Thus, under *Chevron*, the Florida court, whose Commerce Clause decision merely applied settled principles, would not have considered departing from the usual rule of retroactivity because Florida had not justifiably relied on any former principle of law. Under *Chevron*, neither the Florida court nor this Court would consider the "equitable" arguments that the State has advanced to justify Florida's denial of retroactive relief. A state that has violated clearly established law is not in a position to invoke equitable considerations. However, even if the State's "equitable" arguments were relevant, they are without merit.

The State asserts that Florida's discriminatory taxation did not injure McKesson because Florida unquestionably had the power to tax McKesson at the same rate that it did. While Florida plainly had the authority to impose a tax, Florida did not, under the Commerce Clause, have the authority to impose a discriminatory tax in favor of local competitors. The right which McKesson invoked in this case, like the right invoked, for example, in *Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239, 247 (1931), and in *Allegheny Pittsburgh Coal Co. v. County Comm'n*, ___ U.S. ___, 109 S.Ct. 633, 637 (1989), is the right to equal treatment. McKesson does not claim that it is entitled to recover all of the taxes that Florida imposed under its discriminatory scheme. However, McKesson, like petitioners in *Iowa-Des Moines Nat'l Bank*, is entitled to obtain a "refund of the excess of taxes exacted from [it]." 284 U.S. at 247.

The State also asserts that McKesson did not suffer any injury from Florida's discrimination because McKesson simply "passed on" the cost of the tax to McKesson's customers. The State's assertion ignores both the Florida Supreme Court's own findings in this case and elementary economics.

The Florida Supreme Court found that Florida's discriminatory tax scheme had injured McKesson. The court found: "[i]t is undisputed that manufacturers and distributors of beverages which qualify for preferential treatment under this scheme are in direct competition with manufacturers and distributors of alcoholic beverages which do not." (J.A. 426) The court also found that "there are clearly manufacturers and distributors of alcoholic beverages made from local products who receive a competitive advantage from the challenged provision." (J.A. 425) Specifically, the court found that the discriminatory tax scheme "clearly raises the relative cost of doing business" for McKesson and others and "strips away" their "competitive and economic advantages." (J.A. 427)[7]

Indeed, the Florida legislature designed the challenged tax scheme to impose greater costs on interstate commerce to the advantage of local commerce. (J.A. 84, 106-09, 120, 127-30) The legislature intended the discriminatory scheme to cause McKesson and other interstate competitors to raise their prices ("pass on" the added tax) and, therefore, lose market share to the favored local competitors. In testifying before a Florida House of Representatives Committee, one legislative sponsor explained that the Revised Florida Products Exemption was designed to preserve the protectionism that the original Florida Products Exemption had conferred upon the Florida alcoholic beverage industry. "With the language that we have here, we are

[7]The Florida court did not reconcile its speculative "pass-on" claim that it stated at the end of its opinion, when denying retroactive relief, with its finding that McKesson suffered competitive harm as a result of Florida's discrimination. The court does not cite to any evidence, either in or outside the record, to support this "pass-on" claim.

trying to preserve this Florida industry, leaving access to interstate commerce but limiting it in such a way that our industry benefits." (J.A. 106-09)

The Florida legislature, in seeking to benefit Florida businesses at the expense of their interstate competitors, understood the economics of its discriminatory tax scheme. The legislature understood that McKesson did not have a monopoly that would allow McKesson to "pass on" higher taxes through higher prices without affecting its volume of sales. McKesson's products directly competed with the favored Florida products. Thus, McKesson could not simply "pass on" the costs of the discriminatory tax in a competitive market and still retain its original market share. Either McKesson could absorb all or most of the taxes and attempt to retain its original market share, or McKesson could increase its price to cover all or most of the taxes and lose some of its original market share. Under either scenario, as the Florida Supreme Court found, and as the Florida legislature intended, Florida's discriminatory tax scheme "stripped away" McKesson's "competitive and economic advantages."

In *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), this Court rejected the state's claim that the wholesalers had "passed on" the tax and therefore could not show economic injury to support their standing to challenge the tax. The Court observed: "even if the tax is completely and successfully passed on, it increases the price of their products as compared to the exempted beverages." *Id.* at 267. The Court also has rejected "pass-on" arguments in antitrust cases, finding that a demonstration of the economics of such arguments would require a showing of "virtually unascertainable figures." *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 491-94 (1968). *See also Illinois Brick Co. v. Illinois*, 431 U.S. 720, 731-32 (1977). The Court in *Illinois Brick* noted:

> [t]he principal basis for the decision in *Hanover Shoe* was the Court's perception of the uncertainties and difficulties in analyzing price and output decisions "in the real economic world rather than an economist's hypothetical model," 392 U.S. at 493, and of the costs to the judicial system and the efficient enforcement of the antitrust laws of attempting to reconstruct those decisions in the courtroom. [Footnote omitted]

431 U.S. at 731-32.

The State in its Brief supports its "pass-on" argument by citing *State ex rel. Szabo Food Serv., Inc. v. Dickinson*, 286 So.2d 529 (Fla. 1973). *Szabo* addresses a taxpayer's standing to sue, where the taxpayer in fact "bore no tax liability." *Id.* at 532. In this case, the Florida Supreme Court expressly found that McKesson was liable for the challenged taxes and has "standing to litigate whether the allegedly discriminatory scheme has had an adverse competitive impact" on its business. (J.A. 416) *Szabo* is no answer to the Florida Supreme Court's finding in this case that Florida's discriminatory tax scheme plainly injured McKesson.

In rejecting retroactive taxation for this case, the State observes that retroactive taxation would not be an acceptable remedy for Florida's discrimination because the favored distributors could not "pass on" the burden of increased taxes. State's Brief on Reargument at 6. The State's observation suggests that even the State does not believe that its "pass-on" argument makes sense. If McKesson could have "passed on" the burden of higher taxes without affecting its market share, as the State claims, the favored Florida competitors, of course, could now do the same.

Finally, the State argues that retroactive relief in this case would

impose a burden on the State's treasury.[8] Florida, however, has resisted every opportunity to eliminate or minimize any burden that this case will impose on its treasury. First, the Florida legislature resolved to preserve rather than excise the protectionism in its alcoholic beverage tax statutes after this Court's decision in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984). After the Florida circuit court held in this case that Florida's tax scheme violated the Commerce Clause, the State refused to end the discrimination pending appeal, despite McKesson's argument that continued enforcement of the scheme would further expose Florida's revenues to claims for refunds. (J.A. 272-76) The State also rejected any notion of an escrow for tax funds at risk. (J.A. 286) Florida even resolved to enact yet another discriminatory tax scheme after the Florida Supreme Court's decision in this case. *See Ivey v. Bacardi Imports, Co., Inc.*, 541 So.2d 1129 (Fla. 1989). In light of Florida's actions, the State's horrific references to "economic and administrative dislocation," as a result of retroactive relief, fall flat.

This Court's decision to enforce the Commerce Clause by directing Florida to refund discriminatory taxes in this case would not produce economic calamity among states.

First, state legislatures may continue to enact statutes that require interstate commerce to pay its fair share of taxes without discriminating in favor of local commerce. States that do not enact tax statutes in violation of clearly established law may invoke *Chevron's* prospectivity doctrine to avoid retroactive relief in cases challenging their statutes when equitable considerations are compelling. States such as Florida that engage in a pattern of discriminatory taxation in

[8]Curiously, the State repeatedly cites this Court's decision in *Milliken v. Bradley*, 433 U.S. 267 (1977), in arguing that a tax refund would not be appropriate in this case. In *Milliken*, the Court approved extraordinary remedies to overcome the lingering effects of a particular constitutional violation. In this case, the remedy that McKesson has sought, a tax refund, is the *common remedy* under both federal and state law for unlawful taxation.

violation of clearly established law cannot and should not avoid appropriate relief.

Second, a state that acts promptly to correct its discriminatory taxation – rather than tenaciously resisting equal tax treatment – may, if it chooses, avoid or reduce any tax refund liability by retroactive taxation. Florida has rejected retroactive taxation as an alternative remedy for its discrimination. Florida may not now reach back the necessary five years to tax retroactively Florida's favored taxpayers, without violating due process. *See, e.g., Welch v. Henry*, 305 U.S. 134, 146-151 (1938).

Finally, all states, including Florida, retain the uncontested authority to raise additional revenues, if they choose, through additional but equal taxes on commerce.

The State cannot sustain its "equitable" claim that Florida should be allowed to preserve its protectionist discrimination, in violation of clearly established law, by denying any retroactive relief.

CONCLUSION

McKesson respectfully prays that this Court reverse the Florida Supreme Court's final decree with respect to its denial of retroactive relief. Specifically, McKesson is entitled to the difference between what McKesson actually paid in taxes for its disfavored products under the unconstitutional Revised Florida Products Exemption and what McKesson would have paid in taxes under the rates that the State actually set for the favored products.

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Respectfully submitted,

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Petitioner McKesson Corporation's Revised
Rule 28.1 List of Parent Companies, Subsidiaries
(Except Wholly-Owned Subsidiaries) and Affiliates

Armor All Products Corporation
Armor All Products of Canada, Inc.
Armor All Products GmbH
APC Chemicals Inc.
City Properties, S.A.
Comercial Farmaceutica Interamericana, S.A.
Comercial Interamericana, S.A. (Dom. Rep.)
Comercial Interamericana, S.A. (El Salvador)
Comercial Interamericana, S.A. (Guatemala)
Corporacion Bonima, S.A.
Distribuidores Especialdades, S.A.
Distribuidora Farmaceutica Calox Colombiana, S.A.
Health Data Services, Inc.
Intercal, Inc.
International Health Services, Ltd.
Investigaciones Farmoquimicas De Colombia, S.A.
Laboratorios Calox, C.A.
Medilog Corporation
Medilog GmbH
Organizacion Farmaceutica Americana, S.A.
PCS, Inc.
PCS of New York, Inc.
PCS Services, Inc.
Pharmaceutical Card System Canada, Inc.
Pharmaceutical Data Services, Inc.
SDC Distributing Corp.
Sunbelt Beverage Corporation